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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

CALIFORNIA ENERGY COMMISSION;
CALIFORNIA PUBLIC UTILITIES COMMISSION;
DEPARTMENT OF WATER AND POWER OF THE
CITY OF LOS ANGELES;
PUBLIC SERVICE DEPARTMENT OF THE CITY OF BURBANK;
PUBLIC SERVICE DEPARTMENT OF THE CITY OF GLENDALE;
WATER & POWER DEPARTMENT OF THE CITY OF PASADENA;
PACIFIC GAS AND ELECTRIC COMPANY;
SOUTHERN CALIFORNIA EDISON COMPANY;
and SAN DIEGO GAS & ELECTRIC COMPANY,
Petitioners,

vs.

BONNEVILLE POWER ADMINISTRATION;
JAMES J. JURA, as Administrator;
JAMES WATKINS, as Secretary of the
Department of Energy of the United States of America;
and the UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

February 4, 1991

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QUESTIONS PRESENTED

1. Whether a federal proprietary agency's interpretation of its governing statute is entitled to the same deference afforded to an independent regulatory agency when the proprietary agency's interpretation directly enables the agency to earn greater revenues than an alternative interpretation that is more consistent with the statutory language.

2. Whether the court of appeals erred in holding that the Bonneville Power Administration's Long Term Policy for allocating access to inter-regional power transmission lines, which gives Northwest utilities a clear preference in the allocation of federal transmission capacity, is consistent with the mandate of 16 U.S.C. § 838d that "any capacity in the Federal transmission system" that is not necessary to transmit federal power must be made "available to *all* utilities on a fair and nondiscriminatory basis."

LIST OF PARTIES

The parties to the proceeding below were petitioners California Energy Commission ("CEC"); California Public Utilities Commission ("CPUC"); Pacific Gas and Electric Company;[a] Department of Water and Power of the City of Los Angeles; Public Service Department of the City of Burbank; Public Service Department of the City of Glendale; Water & Power Department of the City of Pasadena; Southern California Edison Company;[b] and San Diego Gas & Electric Company;[c] and respondents Bonneville Power Administration ("BPA"), James J. Jura as Administrator of BPA; John S. Herrington as Secretary of the Department of Energy of the United States of America; and the United States of America.

In addition, the following Pacific Northwest entities were petitioners or intervened as petitioners in consoli-

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[a]Pacific Gas and Electric Company, a petitioner in this proceeding, has no parent holding company. Its non-wholly owned subsidiaries are: Alberta Natural Gas Company Ltd.; ANG Liquids Ltd.; ANG Processing Ltd.; ANG Realty Ltd.; ANG Resource Marketing Ltd.; CanStates Holdings Inc.; ANGUS Chemical Company; ANGUS Chemie GmbH; ANGUS Fine Chemicals Ltd.; ANGUS International Ltd.; CanStates Energy Inc.; CanStates Hydrocarbons Inc.; Rankin Petroleum Inc.; Foothills Pipe Lines (South B.C.) Ltd.; International Permeation Inc.; Magnesium Company of Canada Ltd.; PG&E-Bechtel Generating Company; Standard Pacific Gas Line Incorporated.

[b]Southern California Edison Company, a petitioner in this proceeding, is a wholly-owned subsidiary of its parent holding company SCE Corp. Southern California Edison Company has no non-wholly owned subsidiaries.

[c]San Diego Gas & Electric Company, a petitioner in this proceeding, has neither a parent company nor any non-wholly owned subsidiaries.

dated proceedings to review Bonneville's Long Term Intertie Access Policy: Puget Sound Power & Light Company; Washington Water Power Company; Pacific Northwest Generating Company; Vanalco, Inc.; Aluminum Company of America; and Columbia Falls Aluminum Company.

The following Pacific Northwest parties intervened as respondents in the proceedings below: Association of Public Agency Customers; Public Power Council; Public Utility District No. 1 of Chelan County, Washington; Pacificorp, dba Pacific Power and Light Company; Public Utility District No. 2 of Grant County, Washington; Western Public Agencies Group; Montana Power Company; City of Seattle, City Light Department; Public Generating Pool; Eugene Water & Electric Board; Direct Service Industrial Customers; Portland General Electric Company; ARCO; Nongenerating Public Utilities; and Northwest Power Planning Council.

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& Electric Company petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 909 F.2d 1298 (9th Cir. 1990) ("*CEC II*") and reproduced at Appendix A. The opinions in two earlier related cases, *California Energy Resources Conservation and Development Commission* v. *Bonneville Power Administration*, 831 F.2d 1467 (9th Cir. 1987), cert. denied, 488 U.S. 818 (1988) ("*CEC I*"), and *Department of Water and Power of the City of Los Angeles* v. *Bonneville Power Administration*, 759 F.2d 684 (9th Cir. 1985) ("*LADWP*"), are reproduced at Appendices B and C, respectively.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its opinion and judgment on July 26, 1990. The court denied a petition for rehearing on October 5, 1990. App. D4. On December 21, 1990, Justice O'Connor entered an order extending the time within which to file this petition to and including February 4, 1991. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

PRINCIPAL STATUTES INVOLVED

Section 6 of the Act of August 31, 1964, 16 U.S.C. § 837e, provides in pertinent part:

> Any capacity in Federal transmission lines connecting, either by themselves or with non-Federal lines, a generating plant in the Pacific Northwest or Canada with the other area or with

> any other area outside the Pacific Northwest, which is not required for the transmission of Federal energy [or Canadian Treaty energy], shall be made available as a carrier for transmission of other electric energy between such areas.

Section 6 of the Federal Columbia River Transmission System Act of 1974, 16 U.S.C. § 838d, provides in full:

> The Administrator shall make available to all utilities on a fair and nondiscriminatory basis, any capacity in the Federal transmission system which he determines to be in excess of the capacity required to transmit electric power generated or acquired by the United States.

STATEMENT OF THE CASE

The Bonneville Power Administration ("BPA") is a federal power marketing agency within the Department of Energy. It has two essential purposes: (1) to market electric power produced by federally-owned generators, primarily from a system of dams on the Columbia River, and (2) to build and operate power lines to transmit federal and non-federal power to markets within and outside the Northwest. 16 U.S.C. §§ 832-832l, 837-839h. App. A4. This case involves BPA's administration of the northern portion of the "Pacific Intertie," a system of power lines that link the Pacific Northwest with California and Canada.

1. *The Pacific Intertie.* As the court of appeals explained, "[i]t is useful to think of the Intertie as a pipeline in which electricity flows." App. C3-C4, n.4. BPA owns and operates virtually all of the northern portion of the Pacific Intertie. *Id.* at C3. South of the Oregon border, the Intertie is owned and used by several California

utilities and public agencies, many of which are the petitioners here.[1] In order to consummate mutually beneficial sales and exchanges of electric power, buyers and sellers in the Northwest, Canada, and California must have access to the Intertie.

Because access to the federal portion of the Intertie is vital for both public and private entities, Congress was very clear in how it wanted the Intertie allocated. Congress gave BPA an absolute preference for all federal Intertie capacity needed to transmit federal energy. 16 U.S.C. § 837e.[2] But Congress provided that all *excess* capacity was to be made available to "*all* utilities on a fair and nondiscriminatory basis." 16 U.S.C. § 838d (emphasis added). Thus, all non-federal users were to have equal access to BPA's Intertie. Congress authorized neither discrimination between buyers and sellers nor discrimination among the three regions.

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[1]The California portion of the Intertie was built by three private and four municipal utilities and primarily funded by their ratepayers: Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, Department of Water and Power of the City of Los Angeles, and the public utility departments of the Cities of Burbank, Glendale, and Pasadena. These owners share some of their capacity under long-term contracts with the California Department of Water Resources, the Sacramento Municipal Utility District, and the Western Area Power Administration (which, like BPA, is a federal power marketing administration with some Intertie-related transmission lines of its own). Charts presented to Congress depicting the shares of the Intertie, as of 1987 and after planned expansions, are reproduced in the Appendix. App. F1-F2.

[2]A similar preference was given to "Canadian Treaty Energy," Canada's share of power generated in the United States as a result of regulation of the Columbia River in Canada. App. C21. For purposes of this petition, references to the preference for federal energy include Canadian Treaty Energy.

For twenty years after Congress authorized the Intertie, BPA interpreted these statutes in accordance with their plain meaning: BPA reserved the capacity it needed to transmit federal energy, but it made the remaining capacity available on a first-come, first-served basis to utilities that had successfully negotiated transactions. App. B5; C6-C7. When Northwest energy was scarce, California buyers would compete to purchase it, and the price would rise. But when Northwest energy was plentiful, competition among sellers meant that prices would fall.[3]

2. *The BPA's Intertie Access Policies.* In September 1984, BPA adopted the first of a series of Intertie Access Policies, all of which were designed to prevent competition among sellers and enable BPA to raise the price of electricity sold to California. App. C9. Although it justified the first (or "Interim") policy on the need to increase federal revenues, BPA did not simply promote that interest by enforcing its own statutory right to use the Intertie for federal energy ahead of other users. Instead, BPA

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[3]The only exception to this competitive method for allocating the market occurred during periods of "spill." "Spill" exists when Northwest dams are overflowing, Northwest demand is fully met, and surplus hydroelectric energy must either be generated immediately for short-term sales outside the Northwest or the water's electric generative potential will be wasted. App. A7 n.1. Until 1984, BPA allocated its Intertie capacity during spill under the "Exportable Energy Agreement," a contractual arrangement between BPA and all the generating utilities in the Northwest. That agreement provided for pro rata allocation of the federal Intertie among all Pacific Northwest sellers, with an important caveat: all of the energy sold over BPA's Intertie was sold as federal energy at BPA's lowest nonfirm energy rate. See *California Energy Comm'n* v. *Johnson*, 767 F.2d 631, 634 (9th Cir. 1985). This arrangement protected sellers from competition only during spill conditions; it also protected buyers from abuse of that competitive restriction through a price cap.

adopted a policy that (1) placed both BPA's energy *and the energy of all other Pacific Northwest energy sellers* ahead of any other utility's use of the Intertie and (2) restricted competition, not only against BPA, but also *among the non-federal Northwest sellers*. Thus, through a horizontal market allocation mechanism, BPA categorically discriminated against California. Moreover, it did so in a way that would significantly increase the price for surplus energy that petitioners must pay, not only to BPA, but also to Northwest utilities. The Interim Policy was followed by a "Near Term" Policy in June, 1985, and a "Long Term" Policy in May, 1988.

All three Policies allocated federal Intertie capacity for short-term energy sales on an hourly basis. The Long Term Policy calls this "Formula Allocation." App. E35-E38. The allocation method changes depending on which of three "conditions" exists at any given time.

Under Condition 1, which occurs during times of spill (see *supra* note 3), each Northwest seller (including BPA) receives a fixed share of the Intertie based on its pro rata share of the total energy declared by Northwest utilities and BPA as available for sale to California. App. A7, B6, C12. BPA, moreover, permits Northwest utilities to sell at any price they can get.[4] Because each seller is allocated a fixed share of the Intertie, all sellers can raise their prices without fear of competition from others. App. B15-B16.

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[4]In this crucial respect — the abolition of any protection of buyers through a price cap — the Policy differs from the pre-1984 Exportable Energy Agreement that previously governed access to the Intertie during spill conditions. See *supra* note 3. In most other respects, the rules applicable under Condition 1 are similar to the rules established by that agreement.

The rules under Condition 2, which exists when spill is not imminent but Northwest energy sellers still declare that they have sufficient surplus energy to fill all available capacity on the Intertie, are essentially the same as under Condition 1. App. B6. Under both Conditions 1 and 2, Canadian and California utilities are denied any access to the federal Intertie.

Condition 3 exists when BPA and non-federal Northwest utilities lack sufficient surplus to fill the Intertie. Under Condition 3, BPA apportions the capacity of the Intertie first to itself and to Northwest utilities so that each receives a fixed share sufficient to carry all its surplus energy. Any remaining capacity is then, and only then, made available to utilities outside the Northwest. App. B6.

A study commissioned by Pacific Gas and Electric Company ("PG&E"), and presented to BPA in comments on the final draft of the Long Term Policy, demonstrates that the price PG&E had to pay to non-federal Northwest utilities as a result of the temporary Access Policies increased by approximately 10 mills/kWh (1 cent per kilowatt hour). PG&E, Comment No. 3-188 (LTIAP Record), Appendix at 4. BPA never disputed this estimate. Given the estimated 11.5 billion kWh that non-federal utilities in the Northwest sold to California in 1985,[5] the Policy therefore caused a transfer of approximately $115 million from consumers in California to non-federal utilities in the Northwest during that one year alone.

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[5]BPA sold 17.3 billion kWh in 1985, and the agency assumes that this is about 60 percent of the total Northwest surplus energy sold to California. BPA, 1985 Program and Financial Summary 33 (1985); App. E247. Thus the total Northwest surplus that year was about 28.8 billion kWh and the non-federal share was about 11.5 billion kWh.

3. *Ninth Circuit Review of the Policies.* The Ninth Circuit reviewed the Interim Policy and upheld it in *Department of Water and Power of the City of Los Angeles v. Bonneville Power Administration,* 759 F.2d 684 (9th Cir. 1985) *("LADWP").* App. C1 to C24.[6] In that decision, the court focused on the Policy's limitation of competition against *BPA's* sales, and held that, if it protected BPA's ability to collect sufficient revenue, the restriction was not only authorized, but mandated. App. C19. The court also held that section 838d, which requires BPA to share excess capacity with "all" utilities on a fair and nondiscriminatory basis, applies only to Northwest utilities, and therefore does not prohibit discrimination against Canadian sellers and California buyers. App. C24. In the court's view, the BPA's governing statutes mandate a preference in favor of Northwest utilities, not just for sales of federal power, but for transmission capacity as well. *Id.*

When it later reviewed the Near Term Policy, the Ninth Circuit recognized that the Policy protected not only BPA, but also non-federal sellers, from competition. *California Energy Resources Conservation and Development Commission v. Bonneville Power Administration,* 831 F.2d 1467 (9th Cir. 1987), cert. denied, 488 U.S. 818 (1988) *("CEC I").* App. B1-B25. The majority candidly acknowledged the anticompetitive nature of the Near Term Policy's allocation scheme:

> The result is a regularly shifting, horizontal division of the market for surplus nonfirm energy [whereby] each eligible producer is temporarily granted sole access to a specified share of

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[6]The Ninth Circuit exercises original jurisdiction to review the final actions of BPA pursuant to 16 U.S.C. § 839f(e)(5).

> the capacity, which it may either use or allow to remain unused without fear of competition by other producers.

App. B15-B16. Nevertheless, the court in *CEC I* upheld the Near Term Policy because more competitive alternatives had not been proposed to BPA in comments on the temporary policies. Accordingly, the court reasoned that consideration of such alternatives should await review of the Long Term Policy. App. B16-B17. The majority also concluded that it was bound by the conclusion of the panel in *LADWP* that BPA was required to discriminate against utilities outside the Northwest in providing access to excess transmission capacity. App. B14.

Judge Norris sharply disagreed:

> The BPA's pro rata allocation scheme for available intertie capacity — a scheme which if implemented by a private party would plainly violate the antitrust laws — paternalistically restricts price competition among Northwest utilities and denies Southwest utilities and energy consumers the benefit of free market pricing for surplus energy offered for sale by privately-owned Northwest utilities. . . .
>
> I can see no statutory authority under which the BPA is authorized to discriminate so clearly in favor of Northwest utilities and against Southwest utilities and energy users. Indeed, the relevant statutory language appears to point the other way. The anticompetitive, pro-Northwest utility slant of the pro rata intertie access plan seems plainly incompatible with the statutory language requiring that the BPA be "fair and nondiscriminatory" in its treatment of *all* utilities, 16 U.S.C. § 838d, as well as the clear under-

> standing recognized in *Department of Water & Power* that the purpose of the intertie was to benefit both the Northwest and Southwest, 759 F.2d at 694.

App. B24-B25. (emphasis in original; footnote omitted).[7]

Although the majority in *CEC I* had deferred review of the Near Term Policy's allocation scheme to permit BPA to consider comments suggesting less anticompetitive alternative means of protecting its revenues, BPA adopted the Long Term Policy without responding to those comments.[8] The Ninth Circuit, in *California Energy Commission* v. *Bonneville Power Administration,* 909 F.2d 1298 (9th Cir. 1990) (*"CEC II"*), nonetheless upheld the Long Term Policy without addressing this failure. The court agreed that BPA has a duty to consider federal antitrust policy, but found that "BPA may allocate Inter-

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[7]The CEC and the CPUC sought review by this Court of the Ninth Circuit's divided decision on May 4, 1988. On May 17, 1988, however, BPA issued its Long Term Policy. For that reason, the Solicitor General, in opposing the petitions for certiorari on behalf of BPA, argued that the challenge to the Near Term Policy "is, in most respects, now moot." Brief for the Respondents in Opposition (No. 87-1835) at 10. The Solicitor General suggested that "the proper course is [for petitioners] to raise whatever objections they still have in a new proceeding" seeking review of the Long Term Policy. *Id.* at 11. This Court denied certiorari on October 3, 1988. *CEC I,* 488 U.S. 818 (1988).

[8]The CEC, for example, pointed out to BPA that if, as BPA contended, competition among non-federal energy sellers would reduce federal revenues indirectly, that revenue loss could be made up by simply allocating a slightly greater than pro rata share of the Intertie to BPA in accordance with the statutory preference for federal energy. CEC, Comment No. 3-218 (LTIAP Record), at 44 & n.44, 48. BPA ignored this comment and adopted the anticompetitive fixed allocations instead.

tie capacity on a pro rata basis to satisfy the demands of its governing statutes." App. A21. Without finding that the fixed, pro rata allocations were in fact necessary to satisfy those statutes, the court ultimately upheld the Policy's allocation scheme based on its view that BPA could reasonably be concerned for the welfare of small Northwest utilities who might find it hard to compete with larger utilities and who therefore might be forced to spill energy. App. A22-25.

The Ninth Circuit also held that the Long Term Policy did not contravene section 838d. App. A25-A26 n.14. Addressing the standard for reviewing BPA's interpretation of its governing statutes, the court acknowledged BPA's direct financial interest in the allocation of excess Intertie capacity. App. A13. It also acknowledged the decision of the District of Columbia Circuit in *National Fuel Gas Supply Corp.* v. *FERC,* 811 F.2d 1563, 1571 (D.C. Cir.), cert. denied, 484 U.S. 869 (1987), indicating that an agency is not entitled to full deference in such circumstances because "if the agency itself were an interested party . . . deference might lead a court to endorse self-serving views . . ." App. A13. However, the court in *CEC II* stated that it "disagree[d]" with the District of Columbia Circuit's analysis (*id.*), and held that BPA's interpretation "should be upheld if reasonable." App. A12. Based on this deferential standard of review, the Ninth Circuit upheld BPA's interpretations, including the view that "all utilities" in Section 838d means all *Northwest* utilities. App. A20-A28.

REASONS FOR GRANTING THE WRIT

This "obviously important case"[9] involves the transfer of billions of dollars of wealth from electric utilities and consumers in California to electric utilities in the Pacific Northwest. See *supra* p. 7. The transfer occurs because BPA's Intertie Access Policy eliminates competition among Northwest utilities for the sale of short-term energy to California, and refuses to make excess capacity available to other utilities who would also supply the California market if they could gain access to the federal portion of the Intertie.

This Court's review is required for three reasons. First, the Ninth Circuit's highly deferential review of BPA's statutory interpretations presents a conflict between the Ninth and District of Columbia Circuits as to the appropriate standard of review when a proprietary agency's interpretation may be self-serving. Second, the plain language of the governing federal statutes expressly prohibits discrimination in allocating the capacity of the Intertie. Yet the Ninth Circuit — the only court of appeals with jurisdiction over BPA's decisions — has violated well-settled principles of statutory construction by relying upon ambiguous legislative history to override the plain meaning of the statute. Third, the decision below will have an enormous financial impact on California consumers. Given the lower court's clear errors of law, and "in light of the economic interests at stake," certiorari should be granted. *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distribution Companies,* No. 89-1452 (Jan. 8, 1991), slip op. at 2.

1. As a general rule, federal administrative agencies are entitled to deference in interpreting their governing

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[9] *CEC I,* App. B24 (Norris, J., dissenting).

statutes. To be upheld on review, an agency's interpretation generally must only be reasonable, not necessarily consistent with the court's own view. See, *e.g., Chevron USA* v. *NRDC,* 467 U.S. 837, 843 (1984). However, most federal agencies are not proprietary operations, and therefore generally do not have any direct and immediate financial interest in their own decisions. The decision below presents the issue whether the *Chevron*-style deference generally applied to agency interpretations is fully applicable where, as here, the agency does have such a direct financial stake.

The court below squarely held that deference is required in this situation. The court acknowledged that the BPA "has an economic interest in obtaining a larger share of the economic benefits of interregional transactions" facilitated by the Intertie. App. A13. However, it flatly rejected petitioners' argument that this meant that "BPA should be afforded less deference here." App. A13. Instead, it held that BPA's interpretation "should be upheld if reasonable." App. A12. This holding was critical to the court's decision (1) ignoring the plain language of Section 838d (requiring that excess Intertie capacity be allocated to "*all* utilities on a fair and nondiscriminatory basis") and (2) upholding instead the BPA's effort to rewrite the statute to benefit itself and Northwest utilities at the expense of California consumers. See App. A22-A25; see also App. B14, B24-B25; C24.

The court's resolution of the deference issue warrants review for two compelling reasons. *First,* it presents an acknowledged disagreement among the circuits. In *National Fuel Gas Supply Corp* v. *FERC,* 811 F.2d 1563 (D.C. Cir. 1987), for example, the District of Columbia Circuit noted several "circumstances in which deference would be inappropriate." *Id.* at 1571. Describing one of

those circumstances, the court stated "[I]f the agency itself were an interested party . . . deference might lead a court to endorse self-serving views that an agency might offer . . ." *Id.* After quoting this passage, the court below simply stated, "We disagree." App. A13.[10]

This disagreement between the Ninth and District of Columbia Circuits reflects a conflict between those courts (as well as among other circuits) on the more general question of whether an agency is entitled to deference when it has a substantial incentive — pecuniary or otherwise — to adopt a biased interpretation of its governing statute. For example, the District of Columbia Circuit and the Eighth Circuit have held that an agency is not entitled to *Chevron*-style deference when interpreting the scope of its own authority. *E.g., Ohio Power Co.* v. *FERC,* 880 F.2d 1400, 1405 (D.C. Cir. 1989) (refusing to defer to FERC interpretation of jurisdictional provision of Federal Power Act), *rev'd on other grounds sub nom Arcadia, Ohio* v. *Ohio Power Co.,* 111 S.Ct. 415 (1990); *New York Shipping Ass'n* v. *FMC,* 854 F.2d 1338, 1363 & n.9 (D.C. Cir. 1988) ("it would also be inappropriate for us to defer to the agency where, as here, it is interpreting not the meaning of a statute that Congress has charged it to administer, but rather a statute merely delimiting its jurisdiction"), cert. denied, 109 S.Ct. 866 (1989); *Missouri* v. *Andrews,* 787 F.2d 270, 286-87 (8th Cir. 1986) (refusing to defer to interpretation by Secretary of Interior of Section 9(c) of Flood Control Act), *aff'd on other*

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[10]Not only may BPA's interpretations of these statutes be financially "self-serving," but such interpretations are also suspect because they implement a congressionally recognized BPA bias in favor of the Northwest and against consumers and utilities outside the Northwest. See *Southern California Edison Co.* v. *FERC,* 770 F.2d 779, 784 (9th Cir. 1985).

grounds sub nom ETSI Pipeline Project v. *Missouri,* 484 U.S. 495 (1988). The Third and Ninth Circuits, by contrast, have held that deference *is* required in reviewing an agency's interpretation of its own authority. *E.g., Puerto Rico Maritime Shipping Auth.* v. *Valley Freight Sys.,* 856 F.2d 546, 552 (3d Cir. 1988) (the "rule of deference is fully applicable to an agency's interpretation of its own jurisdiction"); *Wyckoff Co.* v. *EPA,* 796 F.2d 1197, 1200-01 (9th Cir. 1986) (same). In *Arcadia, Ohio* v. *Ohio Power, supra,* this Court granted certiorari on this precise question (see 58 U.S.L.W. 3620 (1989)), but ultimately did not reach it on the merits.

Second, the court of appeals' resolution of this issue has substantial importance beyond this case. Congress has established a number of federal proprietary agencies. Examples include the Federal Home Loan Mortgage Corporation, the Student Loan Marketing Association, the Overseas Private Investment Corporation, the Export-Import Bank, the Tennessee Valley Authority, and five power marketing agencies (of which BPA is the largest). Unlike most government agencies, these institutions are businesses.[11] Most of them compete, in one way or another, with other private and public institutions in pursuing their commercial interests. As this case illustrates, blind application of *Chevron*-style deference to

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[11] *E.g.,* 12 U.S.C. § 1454(a)(1) (authorizing Federal Home Loan Mortgage Corporation to "hold and deal with, and sell" home mortgages and interests in home mortgages); 22 U.S.C. § 2191(c) (authorizing Overseas Private Investment Corporation to "sell[] its direct investments to private investors whenever it can appropriately do so on satisfactory terms"); 12 U.S.C. § 635(a)(1) (authorizing Export-Import Bank "to do a general banking business except that of circulation"); 20 U.S.C. § 1087-2(d)(1)(B) (authorizing Student Loan Marketing Association to "buy, sell, hold, underwrite, and otherwise deal in" certain education-related financial instruments).

every decision by a proprietary agency could well permit those agencies to achieve an unfair and unauthorized advantage in markets where they (or their principal constituencies) operate.[12] Accordingly, this issue is a recurring one that implicates important economic concerns and basic notions of fairness. It therefore warrants review by this Court.

2. The decision below also warrants review because it conflicts with both the plain language of the relevant statutes and this Court's decisions on the proper role of legislative history. Congress has expressly required BPA to make all Intertie capacity that it does not need for transmission of federal energy available "as a carrier" to "*all* utilities" on a "fair and nondiscriminatory" basis. 16 U.S.C. §§ 837e, 838d (emphasis added). The Long Term Policy violates that command by granting priority to Northwest utilities and shielding them from competition in their transactions with California buyers.[13]

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[12]Of course, in a given context, a court may conclude that a proprietary agency does not have a sufficiently direct and immediate financial stake in the interpretation of its governing statute to place in doubt the objectivity of the agency. *E.g., Aluminum Co. of America* v. *Cent. Lincoln Peoples' Util. District*, 467 U.S. 380 (1984) (involving a dispute between two BPA customer groups over their relative priority to receive certain BPA power). Petitioners do not challenge the application of *Chevron*-style deference in that circumstance. In this case, however, the Ninth Circuit has fully recognized that BPA's financial interest is direct and immediate (App. A13, C19) — indeed, BPA's need for revenues has been the principal justification the agency has offered for the Policy (App. B13 & n. 2, C9, E63-E65) — and yet the Ninth Circuit simply disagreed with the proposition that this could provide any reason for a court to accord less deference to the agency's interpretation.

[13]Petitioners recognize that there is no circuit conflict with respect to the interpretation of these specific statutory provisions. However, as the Solicitor General recognized in its brief in *CEC I*, "the

Sections 837e and 838d provide a two-tiered preference for power transmission: first, transmission of federal energy and Canadian treaty energy, and second, transmission of all other non-federal energy. The BPA and the Ninth Circuit, however, found in the statutes a three-tiered preference: first, BPA and utilities desiring to transmit Canadian treaty energy; second, Northwest non-federal utilities; third, utilities located outside the Northwest, including those in California and Canada. App. C24. Neither the language of the statute nor its legislative history supports this judicial attempt at legislation, which gives Northwest utility sellers a preference over non-Northwest sellers and over California buyers in the transmission of electricity over the federal portion of the Intertie. Indeed, when Congress meant for BPA to favor one region over another in the *sale of power*, it knew how to provide that directive and it and did so directly. See 16 U.S.C. §§ 837(c), 837a. No comparable directive exists in the statutes for *allocation of transmission*.

Rather than implementing the plain meaning of the statutes quoted above, the decision in *LADWP* (which the panel in the present case deemed binding (App. A25-A26 n.14)) redefined BPA's statutory authority by transforming the phrase "all utilities" in Section 838d to "all Northwest utilities." It justified this result primarily on the basis of two passages of legislative history.

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exclusive jurisdiction granted to the Ninth Circuit by 16 U.S.C. § 839f(e)(5) makes this an area of the law in which such conflicts inherently do not develop . . ." Brief for Respondents in Opposition (No. 87-1835) at 10. Indeed, this Court has previously granted review of a Ninth Circuit decision interpreting BPA's governing statute despite the absence of a conflict among the circuits. *Aluminum Co. of America* v. *Cent. Lincoln Peoples' Util. District*, 467 U.S. 380 (1984).

First, the court selectively quoted the legislative history of section 837e as follows:

> [BPA] *may enter into agreements* for the wheeling of energy generated in Canada, but such energy . . . does not have the priority granted to Federal energy and Canada's entitlement to [treaty] power benefits . . . .

App. C21 (emphasis, ellipses, and brackets in original). The court concluded that this language allows BPA to discriminate against Canadian non-treaty energy. App. C22.[14] In reaching that conclusion, however, the court in *LADWP* edited the legislative history's language in a way that turns the intended meaning of the statute on its head. The *unedited* language shows that Congress's intent was exactly the opposite of the intent the court found:

> [BPA] may enter into agreements for the wheeling of energy generated in Canada, but such energy *stands on the same basis as any other non-Federal energy. It* does not have the priority granted to Federal energy and Canada's entitlement to [treaty] power benefits . . . .

H.R. Rep. No. 590, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News 3342, 3350 (emphasis added

[14]The Ninth Circuit also stated that the use of the word "may" in the above-quoted statement "is in contrast to the immediately prior paragraph in the legislative history which *requires* BPA to make excess Intertie capacity available to other non-Federal utilities." App. C21. (emphasis in original). The "prior paragraph," however, in fact makes no distinction between Canadian non-treaty and other non-federal energy. H.R. Rep. No. 590, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Cong. & Ad. News 3342, 3350. Rather, that paragraph deals with Congress's intent concerning how BPA should provide long-term arrangements for transmission.

to the portion omitted by the Ninth Circuit). Thus, Congress expressly indicated, in the very passage on which the court in *LADWP* purported to rely, that Canadian energy was not to be treated any differently from any other non-federal energy.[15]

Second, the court noted that the House Report discussing section 838d states that the statutory requirement for "fair and nondiscriminatory" access for "all" utilities "is not intended to represent a policy having application other than in the Pacific Northwest." App. C22 (quoting H.R. Rep. No. 93-1375, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5810, 5814). However, the parallel Senate Report makes the meaning of this statement crystal clear: Congress intended that the duty not to discriminate would apply only to *BPA's* transmission lines (all of which are within the Northwest), and would therefore not affect the obligations of federal power marketing agencies operating outside the Northwest.[16]

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[15]Similarly, the court's view that such discrimination is justified by the fact that "Congress intended that the Intertie be used primarily for the benefit of Northwest and Southwest utilities and not for the benefit of Canadian utilities" (App. C22) is flawed. As Judge Norris noted, "the exclusion of Canadian power, arguably unobjectionable in its discrimination against Canadian producers, discriminates against Southwest energy purchasers — intended beneficiaries of the intertie." App. B24 n.1.

[16]The Senate Committee Report states:

> Section 6 provides that the Administrator of the Bonneville Power Administration shall not discriminate among classes of customers in making agreements to transmit electric power over Federal transmission lines. The intention of this provision is to enable the Administrator to carry out the responsibilities assigned to him in this measure. *It is not the Committee's intention to make an expression of Congressional*

Aside from the Ninth Circuit's distortion of the legislative history, the court's reliance on that inconclusive history to override the plain statutory language conflicts with this Court's decisions. This Court has long held that "absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n.* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). In this case there is no clear Congressional intent to limit the application of the nondiscrimination requirement of Section 838d to utilities in the Northwest. After all, the plain language says "*all* utilities," not "all Northwest utilities." Because "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States* v. *Ron Pair Enterprises*, 109 S.Ct. 1026, 1030 (1990) (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)).

At most, the passages of legislative history upon which the Ninth Circuit relied reflect general views about the scope of the statutes at issue, rather than any specific intent to limit the reach of Section 838d's non-discrimination provision to Northwest utilities. But, as this Court has held, "generalizations [in legislative history] are inadequate to overcome plain textual indication." *United Savings Ass'n* v. *Timbers of Inwood Forest Associates*, 484 U.S. 364, 380 (1988). Moreover, as this Court held in *Garcia* v. *United States*, 469 U.S. 70, 78 (1984), a reviewing court should not "narrow the plain meaning of [a] statute on the basis of a gestalt judgment as to what Congress probably intended." That, however, is exactly

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policy regarding the transmission of energy over Federal systems outside of the Pacific Northwest.

Sen. Rep. No. 93-1030, 93d Cong., 2d Sess., at 10 (1974) (emphasis added).

what the Ninth Circuit has done here in narrowing the phrase "all utilities" to mean "all Northwest utilities."[17]

In short, the Ninth Circuit's interpretation of Section 838d, which not only misreads the legislative history but also flouts well-settled principles of statutory construction, plainly warrants this Court's review. That review is particularly important in light of the fact that the Ninth Circuit is the only court of appeals with jurisdiction over BPA decisions. Only this Court can correct the Ninth Circuit's grave misinterpretation of this important statutory protection.

3. Finally, the decision below warrants review because of its tremendous economic impact. See *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distribution Companies*, No. 89-1452 (Jan. 8, 1991), slip op. at 2. The BPA Formula Allocation scheme is, at bottom, a "horizontal division of the market for surplus nonfirm energy"

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[17]The Ninth Circuit has also ignored the plain meaning of Section 837e in its decision to uphold the "Assured Delivery" provisions of the Long Term Policy. In those provisions, BPA limits the amount of long-term transmission service that it will make available even when that service can be provided from excess Intertie capacity. The court holds that "there is no requirement in the governing statutes that BPA provide *any* access on a firm basis." (emphasis added) App. A27. Yet Section 837e requires BPA to make available "[a]ny capacity in Federal transmission lines . . . which is not required for the transmission of Federal energy," and BPA can provide transmission on a firm basis without disrupting the transmission of its own energy. The effect of this ruling is to render impossible long-term arrangements between Northwest and California utilities, such as seasonal power exchanges, which take advantage of the fact that peak demands for electricity in the two regions occur at different times of the year. These exchanges were one of the principal reasons Congress authorized construction of the Intertie. *LADWP*, App. C3; H.R. Rep. No. 590 88th Cong. 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News 3342, 3343.

sold by the very Northwest utilities that are the BPA's principal political constituency. App. B15-B16. For this reason, as Judge Norris recognized, that scheme "would plainly violate the antitrust laws" if it were "implemented by a private party." App. B24 (Norris, J., dissenting). The BPA, which has a duty to consider antitrust concerns (*e.g., Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747, 759 (1973)), utterly failed to give these consequences of its Policy the consideration or the weight they required.[18]

The costs of this BPA-created cartel to California electricity consumers are enormous. An estimate submitted to (and never disputed by) the BPA found that the price paid for surplus power to non-federal Northwest

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[18]As explained above (*supra* p. 5), the BPA's principal justification for the Formula Allocation scheme was a desire to protect, and indeed, increase its own revenues. At the invitation of the Ninth Circuit in *CEC I* (App. B16-B17), Petitioners proposed several alternatives that would have generated the same amount of federal revenue without adverse competitive consequences. *Supra* note 8. However, the BPA, with the *CEC II* court's approval, did not expressly consider these alternatives or explain its reasons for rejecting them. This was a plain violation of the requirement of reasoned decisionmaking (*Walter O. Boswell Memorial Hosp.* v. *Heckler*, 749 F.2d 788, 797 (D.C. Cir. 1984); 42 U.S.C. §§ 7152(a)(1)(D) & (a)(2), 7191(a)(1) and (d)), notwithstanding the Ninth Circuit's conclusion that the BPA gave *some* consideration to antitrust concerns.

The Ninth Circuit's view that BPA's anticompetitive Policy is justified by BPA's concern for the welfare of small Northwest utilities is also flawed. App. A23-A25. Even if there were a statutory justification for this preference (which there is not, see *supra* pp. 16-21), the BPA itself only cited this concern as a justification for pro rata allocations under spill conditions. App. E136. It is plainly not necessary to restrict competition throughout the year, as the Long Term Policy does, in order to protect small utilities during the limited periods of spill.

utilities has increased by approximately one cent per kilowatt hour as a result of the BPA's Formula Allocation scheme. See *supra* p. 7. Accordingly, in 1985 alone, this scheme caused California consumers to pay an estimated $115 million to Northwest non-federal utilities for the approximately 11.5 billion kilowatt hours California utilities purchased from those non-federal sellers. Although the amount of electricity sold to California will vary from year to year depending upon Northwest rainfall and water flows, petitioners believe that this estimate demonstrates that over the indefinite life of the Intertie Policy, BPA's cartel will likely cost California consumers billions of dollars in increased energy bills.

* * * * *

Congress has recognized only two exceptions — for federal and Canadian Treaty energy — to the requirement that BPA allocate the capacity of the Intertie on a fair and nondiscriminatory basis. The Long Term Policy creates an additional exception that conflicts with the plain language of BPA's governing statute. Even if the statute were not so clear, the undisputed anticompetitive consequences of the Policy's allocation, and BPA's own economic self-interest, must have some bearing on how the statutes are to be interpreted and applied. Yet the Ninth Circuit has disregarded both the BPA's financial interest as well as the plain language of the statute and well-established principles governing the use of legislative history.

The economic consequences of these errors amount to billions of dollars. The issue is simply too important to leave exclusively to the Ninth Circuit.

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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